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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

RALPH AH SAM, RAYMOND F. DUFFINA,
RICHARD J. KARASAKI, RICHARD Y. C. LAU,
and EDWIN PREGILL,
Petitioners

v.

THE UNITED STATES,
Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether the applicable provisions of law should be construed to allow inclusion of cost-of-living allowances (COLA) in determining rates of basic pay for federal General Schedule (GS) employees, contrary to the basic statutory analysis in *United States v. Clark*, 454 U.S. ——, 108 S. Ct. 805 (1982).

2. Whether the applicable provisions of law should be construed to subject GS employees receiving COLA to different treatment from that accorded all other similarly situated GS employees not receiving COLA.

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OPINION BELOW

The opinion of the Court of Claims, not yet officially reported, appears at 599 F.2d 411 (1982) and in the Appendix.

JURISDICTION

The judgment of the Court of Claims was entered on May 19, 1982. An order extending time to file the petition for certiorari from August 17, 1982 to September 16, 1982 was granted by the Chief Justice on August 10, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1255.

STATUTES INVOLVED

In pertinent part, the fifth amendment to the United States Constitution states: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . ."

In pertinent part, 5 U.S.C. § 5334(a), the "highest previous rate" rule states:

> The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission] in conformity with this subchapter and chapter 51 of this title when—
>
> (1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;
>
> . . . . .
>
> (6) his employment status is otherwise changed; or
>
> (7) his position is changed from one grade to another grade.

In its entirety, 5 U.S.C. § 5333(b) states:

> Under regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission], an employee in a position to which this subchapter applies, who regularly has responsibility for supervision (including supervision over the technical aspects of the work concerned) over employees whose pay is fixed and adjusted from time to time by wage boards or similar administrative authority as nearly as is consistent with the public interest in accordance with prevailing rates, may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised, or at the maximum rate for his grade, as provided by the regulations.

In its entirety, 5 U.S.C. § 5941(a) states:

> Appropriations or funds available to an Executive agency, except a Government controlled corporation, for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances to these employees. The allowance is based on—
>
> (1) living costs substantially higher than in the District of Columbia;

(2) conditions of environment which differ substantially from conditions of environment in the continental United States and warrant an allowance as a recruitment incentive; or

(3) both of these factors.

The allowance may not exceed 25 percent of the rate of basic pay. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies.

STATEMENT OF THE CASE

Petitioners are or were civilian employees at the Pearl Harbor Naval Shipyard in Hawaii who were transferred or promoted prior to June 26, 1974 from "blue collar" positions payable under the prevailing rate system (WS) to "white collar" supervisory positions payable under the General Schedule (GS) and who thereafter supervised their former fellow WS employees.

By virtue of this transfer or promotion from WS to GS positions, petitioners were entitled to a rate of basic pay governed by 5 U.S.C. § 5334(a), the "highest previous rate" rule. This statutory rule, and its implementing regulations, allows an employee to be paid at a rate which does not exceed his highest previous rate, provided that, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. 5 C.F.R. § 531.203(c) (1974).

Because petitioners supervised WS employees, they were also entitled to a rate of basic pay exceeding the highest rate paid to regularly-supervised WS subordinates under 5 U.S.C. § 5333(b), the "highest-paid subordinate" rule. Both statutes are part of the uniform nationwide GS pay system. 5 U.S.C. § 5331 *et seq.* GS employees in Hawaii also receive a cost-of-living allowance (COLA) in accordance with 5 U.S.C. § 5941.

Before June 26, 1974, the Department of the Navy, complying with its interpretation of the pertinent statutes and regulations, added COLA to the rate of basic pay of GS employees in all pay comparisons made under the two statutes. The net effect of this action was, of course, to award petitioners a lower initial rate of pay and a lower rate *vis-a-vis* their WS subordinates than if COLA had not been added for pay comparisons. From June 26, 1974, the COLA of Hawaii's GS employees was excluded from comparisons made under subsection 5334(a) but maintained for those performed under subsection 5333(b). Department of the Navy Civilian Manpower Management Instruction 531(S2-4)b(2) (1974). Since petitioners were transferred or promoted from WS to GS positions before June 26, 1974, the reversal of policy was not applied to them.

Petitioners and others filed a group grievance contesting the consideration of COLA for these purposes with the Shipyard Commander for submission to the Civil Service Commission. The Office of Civilian Manpower Management of the Navy Department submitted an inquiry to the Civil Service Commission which upheld the Government's interpretation. Petitioners then filed suit in the United States District Court for the District of Hawaii on May 25, 1977. The basis of federal jurisdiction was 28 U.S.C. § 1346.

Upon petitioners' motion to transfer the suit to the United States Court of Claims with respect to five of the eight plaintiffs and the Government's concurrence therewith, this case was transferred to that court on August 1, 1979, pursuant to 28 U.S.C. § 1406(c). The Court of Claims also had jurisdiction under 5 U.S.C. § 5596. Petitioners alleged that the Government's inclusion of COLA violated 5 U.S.C. §§ 5334(a), 5333(b), and 5334(b) and their implementing regulations, and deprived petitioners of their right to equal protection of the law since they were irrationally discriminated against *vis-a-vis* all GS employees not receiving COLA.

In a 2-1 decision, the Court of Claims denied the petition, holding that the agency's interpretation prevailed since nothing in the relevant statutes forbids the use of COLA to establish the rate of basic pay for a GS employee. (Pet. App. at 10a-11a.) The court also held that there was no constitutional violation because: (1) the Government had merely changed its interpretation with respect to subsection 5334(a), and (2) the Government could properly consider COLA for subsection 5333(b) purposes since WS rates contain a cost-of-living factor equivalent to COLA. (Pet. App. at 18a-20a.) Petitioners' subsection 5334(b) claim was rendered moot by *United States v. Clark*, 454 U.S. ——, 102 S.Ct. 805, 70 L.Ed.2d 768 (1982).

REASONS FOR GRANTING THE WRIT

I

This case presents an important question as to the proper interpretation of the governing federal statute fixing the rate of basic pay to which federal GS employees are entitled under 5 U.S.C. § 5331 *et seq.* Petitioners are former WS employees who were transferred or promoted to GS supervisory positions over their former fellow WS employees. By reason of such action, petitioners were entitled to salary increases under 5 U.S.C. § 5334(a), the "highest previous rate" rule and 5 U.S.C. § 5333(b), the "highest-paid subordinate" rule. The specific issue of law is whether the Government may add COLA to the petitioners' rate of basic pay for purposes of determining their entitlement to a salary increase under the two statutory rules.

Only last term this Court addressed the related issue of whether federal WS employees who are promoted to GS positions are entitled to a two-step pay increase under 5 U.S.C. § 5334(b), the "two-step increase" rule.[1] This

[1] Subsection 5334(b) provides that:

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate

Court held that such employees were not entitled to the increase, reversing the judgment of the Court of Claims, *United States v. Clark, supra.*[2]

Writing for a unanimous Court, Justice O'Connor held that the meaning of the word "grade" in subsection 5334 (b) is determined by 5 U.S.C. § 5102(a)(5). That section defines a grade as those positions sufficiently similar to "warrant their inclusion within one range of rates of basic pay in the General Schedule." In consequence, the Court held, § 5334(b) applies only to promotions to a higher grade in the General Schedule. (*United States v. Clark*, 108 S.Ct. at 809, 70 L.Ed.2d at 773).

In accord with *Clark*, petitioners believe that the determination of their rate of basic pay is governed by the General Schedule, as required by 5 U.S.C. § 5102(a)(5). That subsection plainly requires that the rate of basic pay of a GS employee is that appearing in the General Schedule (5 U.S.C. § 5332)—nothing more and nothing less. Just as with the "two-step increase" rule, the closely related "highest previous rate" and "highest-paid subordinate" rules must be governed by the rate of basic pay set forth in the General Schedule. This conclusion appears inescapable from *Clark*. The Government's attempt to add COLA to petitioners' rate of basic pay to determine their entitlement to increases under these statutory rules is logically irreconcilable with *Clark*,[3] in which the Court

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of the higher grade which exceeds his existing rate of basic pay by not less than two-step increases of the grade from which he is promoted or transferred. . . ."

[2] Since the petitioners in this case had raised a "two-step increase" claim which conceivably could have rendered their other claims moot, the Court of Claims stayed its decision pending the outcome of *Clark*.

[3] The Court in *Clark* was not called upon to examine the "highest previous rate" rule, but noted that the General Accounting Office has consistently determined that that rule governs transfers or promotions from a WS to a GS position. (108 S.Ct. at 812 n.16).

carefully delineated the basic purposes and scope of the GS system.

Heedless of the authoritative analysis contained in this court's opinion in *Clark*, the Court of Claims held it permissible to add COLA to the rate of basic pay to determine entitlement to salary increases under the "highest previous rate" rule, subsection 5334(a), and the "highest-paid subordinate" rule, subsection 5333(b). The Court of Claims fell into error because it relied on the agency interpretation—which, of course, is not binding if inconsistent with the provisions or policy of the applicable statute. That is the case here. 5 U.S.C. §§ 5334(a), 5333(b).[4]

The statutory interpretation of the Court of Claims casts a cloud upon the broad fundamental precepts of the GS pay system. It impairs the integrity of the rates of basic pay accorded federal GS employees as established by the General Schedule. It authorizes the Governmment to consider impermissible extraneous factors neither contemplated nor authorized by Congress in determining pay adjustments and entitlements of federal GS employees. It flies in the face of the analysis of the statute made by this Court in *Clark*.

II

The opinion of the Court of Claims places an unwarranted and discriminatory penalty upon GS employees who receive COLA. In the continental United States, GS employees receive salary adjustments under both the "highest rate" and "highest-paid subordinate" rules based solely upon their rates of basic pay as set by the General Schedule. Petitioners, and other federal employees who receive COLA, are denied these increases received by all other GS employees with exactly the same rates of basic

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[4] The agency interpretation also violates the plain meaning of the regulations themselves. *E.g.*, 5 C.F.R. §§ 531.202(i), 531.203(c), 531.302(b), 531.304(a) and (d) (1974).

pay because of the use of COLA in determining their entitlement to these increases. Congress never intended COLA to be used for this purpose.[5]

This disparate treatment violates the petitioners' right to the equal protection of the laws. In order for such distinctions between similarly situated groups to withstand constitutional scrutiny under the equal protection clause there must be a rational basis for the differential treatment. *Dandridge v. Williams*, 397 U.S. 471 (1970).

In its attempt to find a rational basis for the unequal treatment accorded the petitioners, the Court of Claims laid great stress upon the contention that WS pay rates necessarily include a cost-of-living allowance. Thus, the court reasoned, by adding COLA to the GS rate of basic pay and comparing the total to the WS rate, the Government compares "equivalents." As the dissenting judge points out, the court's assertion is completely without authority. (Pet. App. at 23a-25a.)

Thus, the error of the Court of Claims with respect to the permissible purposes of COLA is compounded by its unexplained, and inexplicable, conclusion that COLA and an undefined factor in WS wages are equivalents.

III

If the opinion of the court below is allowed to stand unreviewed, the novel and important issues of federal

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[5] Federal employees "stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute" are presently entitled to COLA. 5 U.S.C. § 5941(a). The explicit purposes of COLA are to compensate these employees at higher levels where living costs are high and/or as a recruitment incentive (*id.*), and not to be included in the rate of basic pay for determining pay adjustments. *See, e.g., Shadduck v. United States*, 142 Ct. Cl. 516, (1958); *Kalv v. United States*, 128 Ct. Cl. 207, 124 F. Supp. 654 *passim* (1954); *Curlott v. Campbell*, 598 F.2d 1175, 1177 (9th Cir. 1979), *modifying Curlott v. Hampton*, 438 F. Supp. 505 (D.Alas. 1977); Federal Personnel Manual (FPM) 591(4-1) d(1) (1963); FPM(4-1)d(1) (1969) (currently in effect).

statutory law raised by this case will in all likelihood recur. The Court of Claims is the often final arbiter of pay disputes involving the United States. *See* 28 U.S.C. § 1491 and 5 U.S.C. § 5596. The precedent established in this case represents an unwarranted disruption of heretofore-settled law with respect to the GS, COLA, and WS statutory schemes. Nor is it likely that conflicts among the circuits will arise since, even if claimants pursue their remedies initially in the federal district courts, such cases are often transferred, as here, to the Court of Claims. *See* 28 U.S.C. § 1406(c). The law, as decided in the court below, if not reversed by this Court, will remain to visit potentially vast disruption upon the nationwide federal pay system.

CONCLUSION

The GS pay system is a uniform, nationwide statutory scheme, *United States v. Clark*, *supra*. Petitioners, although subject to that system, have been accorded rates of basic pay, defined by the General Schedule, at variance with identically-situated federal employees not receiving COLA. This action is based upon clearly erroneous and potentially definitive statutory interpretations of the GS rate of basic pay in contravention of *Clark*, *supra*, and of congressional mandates with respect to the permissible scope and purposes of WS wage rates and COLA.

The Petition for Certiorari should be granted.

Respectfully submitted,

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